ICI AGROCHEMICALS (M) SDN BHD

v.

YAP TECK SENG SDN BHD & ORS

HIGH COURT MALAYA, SHAH ALAM
FAIZA TAMBY CHIK J
[CIVIL SUIT NO: 22-425-94]
17 APRIL 1997

CIVIL PROCEDURE: *Judgment - Setting aside - Whether judgment irregular if obtained without requisite certificate - Whether appearance entered before judgment obtained - Rules of the High Court 1980, O. 13 r. 7(1)(a)*

CIVIL PROCEDURE: *Judgment - Default of appearance - Whether judgment irregular if obtained without filing certificate of non-appearance - Rules of the High Court 1980, O. 13 r. 7(1)(a)*

CIVIL PROCEDURE: *Judgments and orders - Nullity, when - Whether perfected when draft certificate filed - Rules of the High Court 1980, O. 42*

The plaintiff sued the defendants under a letter of guarantee signed by the second to the fifth defendants and obtained a judgment in default of appearance. In this proceeding, the fifth defendant appealed against the decision of the senior assistant registrar ('SAR') who dismissed the application to set aside the default judgment.

The plaintiff had served the writ on the fifth defendant by way of substituted service through a newspaper advertisement on 12 August 1995. On 19 September 1995, the plaintiff obtained judgment in default against the second, fourth and fifth defendants without filing a certificate of non-appearance ('the first judgment'). On 13 November 1995, the plaintiff obtained another judgment in default against the first, second, fourth and fifth defendants ('the second judgment') after filing a certificate of non-appearance. The certificate was however returned to the plaintiff to be retyped on 12 January 1996 as it was not given any court enclosure number.

On 13 February 1996, the fifth defendant lodged a police report stating that his signature on the letter of guarantee had been forged, and on 8 March 1996 applied to set aside the judgment in default. The application was dismissed with costs and the fifth defendant appealed to the judge-in-chambers.

Held:

[1] As the first judgment was obtained without the filing of a certificate of non-appearance as required by O. 13 r. 7(1)(a) of the Rules of the High Court 1980 ('the RHC'), the judgment was irregular.

[2] The second judgment, although purportedly obtained on 13 November 1995, was not supported by a valid certificate of non-appearance as the certificate was not in the proper form and was subsequently returned to be retyped. Order 42 r. 10(2) of the RHC requires a judgment to be drawn up before it is entered and a draft certificate of non-appearance does not satisfy this requirement. The second judgment was presented to the court registry with the requisite certificate of non-appearance only on 14 July 1996 and therefore the judgment was entered on that date and not earlier.

[3] On the facts, the defendants had entered their appearance prior to judgment in default being entered against them. Accordingly, both judgments in default were irregular and had to be set aside.

[4] The person who had purportedly witnessed the fifth defendant's execution of the letter of guarantee had denied under oath that she had in fact witnessed his signature. Furthermore, the evidence showed that the fifth defendant was in Singapore on the date the guarantee was purportedly signed by him. The fifth defendant had therefore raised a *prima facie* defence to the action.

[5] Where a judgment has not been regularly obtained, a defendant is entitled to have it set aside *ex debito justitiae*, that is, irrespective of the merits and without terms. Any objection raised by the plaintiff on the ground of the fifth defendant's delay in bringing the application was therefore irrelevant.

[Appeal allowed.]

Cases referred to:

Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1994] 1 CLJ 329 ***(foll)***

Tatchee Machinery Agency v. Posan Timber Trading Sdn Bhd [1989] 1 MLJ 388 ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 2 r. 2(1), O. 13 r. 7(1)(a), O. 42 rr. 7, 10(1), (2), 13

For the plaintiff - Gregory Chan; Gregory Chan, SS Tam & Co
For the defendants - Izat; M/s Chua Brothers, Azzat & Izzat

Reported by Anne Khoo

JUDGMENT

Faiza Tamby Chik J:

This is an appeal by the 5th defendant against the decision of the Learned Senior Assistant Registrar who dismissed the appellants' application to set aside the judgment in default. The facts may be briefly summarised as follows:

On 24 September 1994, the plaintiff filed an action against all six defendants, of which the fifth defendant is the present appellant, the cause of action of which was based on a letter of guarantee alleged to be signed by the 2nd to 6th defendants on 1 September 1988 (see para. 11 of the statement of claim).

The plaintiff claimed the following relief against all the six defendants:

(a) Money in the sum of RM479,716.28;

(b) Interest of the rate of 8% from the date it is due ie, 18 August 1994;

(c) cost of the action; and

(d) further and other relief.

On 12 August 1995, the plaintiff served the writ on the fifth defendant/appellant by way of substituted service through an advertisement in The Star (see para. 6 of plaintiff's affidavit in reply in encl. 31).

On 19 September 1995, the plaintiff took judgment in default (encl. 27) against the 2nd, and 5th defendants (see minutes of the court file in encl. 27).

The said judgment in default in encl. 27 was entered without of any certificate of non-appearance being filed.

On 13 November 1995, the plaintiff subsequently took another judgment in default (oddly enough, marked as encl. 25 with the words: KIV" written in brackets next to the entry) against the 1st, 2nd and 5th defendants (see minutes of the court file in encl. 25).

A certificate of non-appearance against the 1st, 2nd, 4th and 5th defendants was filed but was not given any court enclosure and was returned to be retyped on 12 January 1996 (see the note made and signed by the Senior Assistant Registrar, Pn. Azni bt Ariffin in the court file reproduced in para. 17 herein).

In December 1995, the 5th defendant was required to execute a letter of guarantee for his company for the purposes of a hire purchase transaction with MBF Finance (M) Berhad. There, he was informed that a judgment in default was entered against him and his name was black-listed by reason of the aforesaid (see para. 6 of encl. 28).

On 13 December 1995, the 5th defendant's former solicitors. Messrs. Yap Liew & Partners wrote to the plaintiff's solicitors, Messrs. Chua Brothers, Azzat & Izzat requesting to be furnished with a full set of cause papers pertaining to the judgment entered against him (para. 9 and exh. B of encl. 28).

On 20 December 1995, the said plaintiff solicitors wrote back:

(a) enclosing the following documents:

(i) Letter of Guarantee purportedly signed by the 5th defendant dated 1 September 1988;

(ii) Writ of summons of statement of claim; and

(iii) an undated and unsealed judgment in default against the 1st, 2nd, 4th and 5th defendants.

(see para. 10 of encl. 28 and exh. A of encl. 31).

(b) informing the 5th defendant's former solicitors that they have filed the aforesaid judgment and were awaiting the court to return the sealed copy of the same (see exh. A of encl. 31).

On 22 December 1995, the 5th defendant's former solicitors received the above letter dated 20 December 1995 from the plaintiffs solicitors along with the said enclosures, at which time the 5th defendant was abroad in England (see para. 4 of encl. 32).

On 10 January 1996, the defendant instructed his former solicitors to remit the said guarantee to the Chemistry Department in Petaling Jaya for investigation and examination (see para. 12 of encl. 32).

On 12 January 1996, the certificate of non-appearance against defendants 1, 2, 4, and 5 was returned to be retyped (see the note made and signed by the Senior Assistant Registrar, Pn. Azni bt Ariffin in the court file).

On 15 January 1996, the Chemistry Department informed the 5th defendant's former solicitors that it was necessary to deliver the original letter of guarantee dated 1 September 1988 for purposes of effective examination, as the 5th defendant only had a photocopy of the same, as opposed to the plaintiff who had the original at all material times (see paras. 13 & 14, and & exh. C of encl. 28).

On 13 February 1996, the 5th defendant/appellant lodged a police report stating that the said letter of guarantee dated 1 September 1988 was never executed by him and hence, his signature is forged (see para 5 and exh. A of encl. 28).

On 15 February 1996, the court posted the judgment in default against 1st, 2nd, 4th and 5th defendants dated 13 November 1995 to the plaintiff's solicitors. The minutes of the court file in encl. 25 read as follows:

Pos pd 15/2/96

13/11/95 (25) Penghakiman Deft. 1, 2, 4, & 5 (KIV)

Perakuan ketidakhadiran Deft 1, 2, 4, 5

dipulangkan unt. Ditaip semula

T.T. (Pn. Azni bt Ariffin) 12/1/96

On 8 March 1996, the 5th defendant filed a summons-in-chambers (encl. 29) and affidavit in support (encl. 28) on a certificate of urgency (encl. 30) to set aside the judgment in default.

On 23 March 1996, encls. 28 and 29 were extracted and were made returnable on 3 April 1996 (see minutes of the court file in encls. 28 & 29).

On 23 March 1996, the judgment in default dated 19 September 1995 in encl. 27 entered against 2nd, 4th and 5th defendants was extracted (see minutes of the court file in encl. 27).

On 25 March 1996, encls. 28 and 29 were served on the plaintiff's solicitors.

On 3 April 1996, the plaintiff's solicitors requested for an adjournment to file an affidavit in reply. Matter was adjourned to 8 April 1996.

On 5 April 1996, the plaintiff affirmed and served its affidavit in reply (encl. 31) on the 5th defendant's solicitors.

On 6 April 1996, the 5th defendant affirmed his affidavit in reply (encl. 32).

On 8 April 1996, the 5th defendant served his affidavit in reply (encl. 32) on the plaintiff's solicitors.

On 8 April 1996, encl. 29 was heard by the Senior Assistant Registrar, Pn. Azni bt Ariffin and the matter was postponed to 16 April 1996 for decision.

On 16 April 1996, the Senior Assistant Registrar, Pn Azni bt Ariffin dismissed the 5th defendant's application in encl. 29 with costs.

On 17 April 1996, the 5th defendant filed, extracted and served a notice of appeal to judge-in-chambers in encl. 33.

Whether The Judgments In Default Are Irregular

There are two judgments in default. There are in Lampiran 27 and Lampiran 25 respectively as follows:

> Tiada kehadiran telah dimasukkan oleh Defendan Kedua, Keempat dan Kelima dalam tindakan ini. Adalah pada hari ini dihakimkan bahawa Defendan Kedua, Keempat dan Kelima hendaklah membayar kepada Plaintif sebanyak Ringgit Malaysia Empat Ratus Tujuh Puluh Sembilan Ribu Tujuh Ratus Enam Belas dan Dua puluh Lapan Sen sahaja (RM479,716.28) dan faedah pada kadar 8% setahun dari 18 Ogos 1994 hingga penyelesaian penuh dan RM225.00 kos.
>
> Bertarikh pada 19 September 1995.
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> Tiada kehadiran telah dimasukkan oleh Defendan Yap Teck Seng Sdn Bhd, Hing Piah Ngian, Yap Teck Ngian dan Yap Teck Fui, Defendan Pertama, Kedua, Keempat dan Kelima dalam tindakan ini. Adalah pada hari ini dihakimkan bahawa Defendan Pertama, Kedua, Keempat dan Kelima hendaklah membayar kepada Plaintif sebanyak Ringgit Malaysia Empat Ratus Tujuh Puluh Sembilan Ribu Tujuh Ratus Enam Belas dan Dua puluh Lapan Sen sahaja (RM479.716.28) dan faedah pada kadar 8% setahun dari 18 Ogos 1994 hingga penyelesaian penuh dan RM225.00 kos.
>
> Bertarikh pada 13 haribulan November 1995.

It is to be noted that no certificate of non-appearance by the 5th defendant was filed by the plaintiff in respect of encl. (27) O. 13 r. 7(1)(a) of the Rules of the High Court 1980 states, "Judgment shall not be entered against a defendant under this Order unless the plaintiff produces a certificate of non-appearance in Form 17". Consequently, I come to the conclusion that the judgment in default in encl. 27 is irregular because there is no certificate of non-appearance in Form 17 filed.

As to encl. (25), the certificate of non-appearance was never duly certified on the date of the second judgment in default was entered. In the case of *Tatchee Machinery Agency v. Posan Timber Trading Sdn Bhd* [1989] 1 MLJ 388 at 389 it was stated, "A distinction must be drawn between judgements or orders that are pronounced, given or made and judgments that are entered. In the case of the former the pronouncement, giving or making of the judgment or order has to take place before the judgment or order can be drawn up. Such judgments or orders take effect from the day of its date and shall be dated on the date on which it is pronounced, given or made (see 42 r. 7).

In the case of the latter the judgment to be entered has to be drawn up before it is entered (O. 42 r. 10(2). Since there is no question of any pronouncement, giving or making of such a judgment and since it comes into effect on its being entered, its date has to be the date that it is entered.

In the instant case the judgment could not have been entered prior to 14 July 1983 since it was only on that date that the judgment to be entered was duly presented to the registry supported by the requisite certificate of non-appearance. The requirements of O. 13 r. 7 cannot be met by submitting to the proper officer draft of the certificate. The requirement of O. 42 r. 10(2) cannot be met by submitting to the proper officer a draft of the order to be drawn up. The actual certificate duly executed by the certifying authority and the judgment duly drawn up has to be presented and only then may the registrar enter the judgment. The date of the judgment will be the date that the judgment was entered and cannot be backdated. If in the meantime the defendant has entered an appearance, the default judgment sought to be entered should be rejected.

In my judgment on the facts the defendants had entered their appearance prior to judgment in default having been entered.

Accordingly the judgment in default which is encl. 8 in the court file was irregularly allowed to be entered. It should be and is set aside".

In *Hasil Bumi Perumahan Sdn. Bhd & Ors v. United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 at 318 the Supreme Court stated:

> On the other hand, in the case of judgments or orders that are entered, they have to be drawn up first before they are entered, and they take effect on their being entered. The date of judgments or orders must necessarily be the date they are entered. (see O. 42 r. 10(2). With respect, *Tatchee Machinery Agency's* case was correctly decided ...
>
> ... Surely it is beyond argument that there should not be two separate dates of entering the same judgment and we cannot accept the draft judgment for the purpose of the entry under O. 42 r. 10(1) as the solicitor for the first appellant chose to have a draft faired in the first instance. It must be the fair copy of the judgment that should be presented for entry in compliance with all the requirements of the Rules of the High Court 1980.

In the result, in my judgment, both the above judgments in default are irregular.

Whether A Prime Facie Defence Is Disclosed

In the instant case the 5th defendant was sued as a guarantor. But the 5th defendant never signed the guarantee. In his affidavit dated 8 Mac 1996 in para 5 encl. (28) the 5th defendant stated. "Saya benar-benar percaya bahawa tandatangan saya telah dipalsukan atau ditirukan. Saya telah melaporkan perkara ini kepada polis. Sesalinan laporan polis dilampirkan di sini dan ditanda sebagai 'eks A'."

And in his salinan Report Polis the 5th defendant stated, "Selepas siasat saya dapat salinan surat jaminan bertarikh 1 September 1988 daripada Chua Brother, Azzat & Izzat, saya tidak pernah melihat surat jaminan itu dan tidak pernah menandatangani surat jaminan itu. Tandatangan pada surat jaminan itu telah dipalsu atau ditirukan."

Again it must be borne in mind that the signature to a Letter of Guarantee almost always has to be witnessed. In the instant case a witness to the said Letter of Guarantee stated under oath that she did not witness the signature of the 5th defendant on the said Letter of Guarantee. In his affidavit dated 6 April 1966 (Lampiran 32) in paras. 13 and 14 the 5th defendant stated:

> Saya menyatakan bahawa saya telah pada 5 April 1996 menerima satu surat akuan dari Puan Yim Yuan Chan yang telah diikarkan pada 4 April 1996. Salinan surat akuan tersebut adalah dilampirkan disini dan ditandakan sebagai eks. Y3.
>
> Puan Yim Yuan Chan adalah saksi kepada surat jaminan yang bertarikh 1 September 1988 dan telah membuat dan berikrar pada surat akuan yang bertarikh 4 April 1996 itu dan menyatakan bahawa beliau tidak pernah menyaksikan tandatangan saya pada surat jaminan.

And exh. Y3 reads as follows:

Statutory Declaration

> I Yim Yuan Chan (NRIC No. 5095429) of full age and a Malaysian citizen of No. 20, Jalan Zabidin, 28400 Mentakab, Pahang Darul Makmur do hereby solemnly and sincerely declare that:
>
> 1. I did not witness the signature of Yap Teck Fui (NRIC No. 5148733) on the Letter of Guarantee dated 1st September 1988.
>
> 2. The only signature that I witnessed on the 1st of September 1988 was the signature of my husband. Yap Teck Kia (NRIC No. 7710373). There were no other signatures on the Letter of Guarantee dated 1st September 1988 except the signature of my husband when I witnessed it.

> And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declaration Act 1960.
>
> Subscribed and Solemnly Affirmed by
>
> YIM YUAN CHAN on the 4th day of April 1996 at 3.25 p.m.

The 5th defendant was out of the country when the Letter of Guarantee was purported to be signed by him. The Letter of Guarantee was dated 1 September 1988 and the 5th defendant was working in Singapore on the date, having been employed there since 17 August 1988. Paragraph 8 of his affidavit dated 6 April 1996 reads, "Saya juga menyatakan bahawa pada tarikh surat jaminan tersebut, iaitu 1 September 1988, saya sedang bekerja di Singapura. Di lampirkan di sini salinan paspot saya (P/P No. E853327) dan ditandakan sebagai eks. Y1, yang menunjukkan bahawa saya telah bekerja di Singapura sejak 17 Ogos 1988 sehingga tahun 1991. Oleh kerana itu, saya ingin menyatakan bahawa surat jaminan tersebut bukannya dokumen yang mengandungi tandatangan saya yang sahih.

Prima facie it can be seen from the above that the 5th defendant has a defence.

The Plaintiff's Preliminary Objection

The plaintiff raised a preliminary objection in that there was a delay of more than 30 days for the 5th defendant to set aside the judgment in default. The unsealed order was sent to the 5th defendant on 20 December 1995. The application by the 5th defendant to set aside the order of the Learned Senior Assistant Registrar was on 8 March 1996. Hence submitted the 5th defendant that was the basis for the 30 days delay. Nevertheless, the sealed order was posted to the 5th defendant on 15 February 1996 and assuming that time began to run from 15 February 1996, the 5th defendant argued that they were still within time in respect of the judgment in default dated 13 November 1995 in encl. (25).

In the case of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd.* [1996] 1 MLJ 30 at 36, 37, 42, 43 the Federal Court stated:

> It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statue or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity.

The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae,* that is to say, irrespective of the merits and without terms. Having said that, it should be added that the application to set aside such a judgement should be made: (a) with reasonable promptitude, in other words within a reasonable time, and (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (see O. 2 r. 2(1) of the Rules of the High Court 1980).

... in appeals to a judge-in-chambers from the decision of a registrar of the High Court, the judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the subordinate courts. Such appeals from decisions of the registrar are by way of an actual rehearing and the judge treats the matter as though it comes before him for the first time. The judge is therefore not confined to the points taken before the registrar so that the rule about new points being not generally open to an appellant to take on appeal does not apply.

Nevertheless, it is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that:

(a) no one has suffered prejudice by reason of the defendants' delay;

(b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or

(c) to let the judgment to stand would constitute oppression. (see *Atwood v. Chichester* [1978] 3 QBD 722: *Harley v. Samson* [1914] 30 TLR 450)

We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the court has power to set aside a judgment in default, despite the defendant's application being out of time, if the particular circumstances of the case require the intervention of the court (see *Beale v. McGregor* [1886] 2 TLR 311).

... the tardiness or the laches of the appellant in making his application, to set aside the default judgment, was not fatal to his application, especially since, in our view, the default judgment was by reason of uncertainty, a nullity and the amendment made by the judge to it by deleting the words 'on monthly rests', did not cure that defect.

For the avoidance of doubt, we would add, that having regard to the chronology of events hereinbefore mentioned, the issue of delay in the present case has been determined without regard to O. 42 r. 13, which came into force only on 1 August 1993, by virtue of PU(A)192/93, and which provides:

> Where in these Rules provisions are made for the setting aside or varying of any order or judgment, party intending to set aside or to vary such order or judgment must make his application to the court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

The appeal is therefore allowed. Order in terms of the notice of appeal dated 17 April 1996 in encl. (33). The two judgments in default dated 19 September 1995 in encl. (27) and dated 13 November 1995 in encl. (25) are set side.